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ABSTRACT

This chapter provides an overview of recent school finance litigation at the local, state, and federal levels. The first section addresses legal challenges to state school finance systems and reviews decisions from Arkansas, California, Colorado, Georgia, Michigan, New York, and West Virginia. Litigation attacking states' methods of funding public schools is based on state constitutional equal protection guarantees and/or education clauses. Questions raised in these cases relate to issues of equity, adequacy, local control, expenditure disparities, minimum level of education, equality of educational opportunity, and appropriateness of program. The next section examines local fiscal issues, including litigation prompted by school board decisions affecting areas such as transportation, length of school week, summer school, and tuition charges. The third section addresses controversial issues at the federal level: (1) the authority of the federal government to recover misspent Title I funds; (2) an order by a federal district court judge freezing Department of Education funds on account of the federal government's failure to provide financial assistance for Chicago's desegregation plan; and (3) federal aid under the Payment in Lieu of Taxes Act. The fourth section addresses the issue of public financial support for nonpublic schools, including tuition tax deductions, transportation aid, and textbooks. A common issue underlying school finance litigation at all levels of governemnt is sufficiency or adequacy of revenue. (TE)

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The Changing School Finance Scene: Local, State, and Federal Issues

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The purpose of this chapter is to provide an overview of recent school finance litigation at the local, state, and federal levels. The first section addresses legal challenges to state school finance systems and reviews decisions from Arkansas, California, Colorado, Georgia, Michigan, New York, and West Virginia. In the sections that follow, various local and federal finance cases are examined, and challenges to public aid strategies for nonpublic schools are highlighted.

CHALLENGES TO STATE SCHOOL FINANCE PROGRAMS

Little doubt exists that the judiciary has played a significant role, either directly or indirectly, in school finance reform. Educators' views of issues such as equity, equality, appropriateness, and adequacy have been and continue to be shaped by judicial opinions. Regardless of how one views judicial intervention in the policy-making arena, the impact is undeniable. The financing of public education has been forced to the forefront of political debate in many states either through court orders or anticipation of potential litigation.

In this section an overview of recent school finance reform litigation is presented. During the early 1980s courts have been quite active but the decisions have not been particularly encouraging for reformers. One of the most shattering defeats was the *Levittown* decision.[1] Preceding this

1. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 453 N.Y.S.2d 643 (N.Y. 1982), *cert. denied*, 103 S. Ct. 775 (1983).

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decision, the state supreme courts in Colorado and Georgia rendered similar decisions upholding their states' school finance systems.[2] Following the New York case, the Supreme Court of Maryland upheld its state school finance program.[3] These defeats, however, in no way signalled the demise of legal challenges. In fact, during this same period West Virginia and Arkansas declared their systems unconstitutional,[4] and new lawsuits continued to be filed.[5]

Challenges to state methods of financing schools remain state constitutional issues. The United States Supreme Court's declaration in 1973 in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental right explicitly or implicitly guaranteed by the federal constitution effectively placed all subsequent legal challenges to funding schemes at the state level under individual state constitutions.[6] The lack of stringency in the federal equal protection analysis enables a state to satisfy the federal constitution by simply showing that its action was rationally related to a legitimate state purpose. Since 1973 the Supreme Court has consistently rejected requests to review state school finance laws.[7] The high court's ruling in *Plyler v. Doe*, striking down a Texas law that barred undocumented aliens from public education, provided fleeting optimism that the Court might reconsider state funding schemes under a more stringent standard of review than the rational basis test.[8] In the Texas case, the Court reasoned that education is entitled to a special status among governmental benefits, thereby requiring states to prove that classifications affecting this interest advance a substantial state goal. Although this heightened equal protection review standard would not be as rigorous as requiring a state to show a "compelling interest" for allowing significant disparities in educational opportunities, it would certainly pose a more formidable barrier than simply requiring the articulation of a rational state objective. The Supreme Court, however, declined to apply this standard to cases involving school funding. In January 1983, the Court refused to review the New York *Levittown* decision, stating,

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2. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).
3. Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758 (Md. 1983).
4. Dupree v. Alma School Dist. No. 30 of Crawford Cty., 651 S.W.2d 90 (Ark. 1983); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).
5. *E.g.*, East Jackson Public Schools v. State of Michigan, No. 82-27983-CZ (Jackson Cty. Cir. Ct. filed 1982); Jesseman v. New Hampshire, No. 82-E-038 (Merrimack Cty. Super. Ct. filed 1982); Webby v. King, No. 78-179 (Me. filed 1982).
6. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
7. Board of Educ. of Cincinnati v. Walter, 390 N.E.2d 812 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); Washakie Cty. School Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), *rehearing denied*, 606 P.2d 340 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).
8. Plyler v. Doe, 102 S. Ct. 2382 (1982).

as in previous appeals, that there was no substantial federal question involved in the case.[9]

As a result of the federal stance, litigation attacking states' methods of funding public schools are based on state constitutional equal protection guarantees and/or education clauses. Questions raised in these cases relate to issues of equity, adequacy, local control, expenditure disparities, minimum level of education, equality of educational opportunity, and appropriateness of program. Courts have attempted to provide definition to these concepts and assess whether individual state constitutional mandates have been met.

Constitutional Systems

Most state courts have followed the lead of the United States Supreme Court, adopting a posture of judicial restraint. Education is viewed by these courts not as a fundamental right under the state constitution but as a policy issue to be resolved in the legislative arena. The primary concern in the case is whether the state is providing a minimum education to all students. No attempt is made to define standards or program components. Recent decisions in Georgia, Colorado, New York, and Maryland exemplify this posture.

The Georgia Constitution specifies that the state legislature shall provide for an adequate education. In the Georgia case, *McDaniel v. Thomas*, the state supreme court accepted the trial court's conclusion that "similarly situated children receive very different amounts of educational resources as a result of disparities among school districts in taxable property wealth per pupil.... The inequalities in the school finance system deny students in property poor districts equal educational opportunities."[10] According to the court, the duty to provide an adequate education would be abridged only if evidence were introduced to show that students in a district were actually deprived of basic educational opportunities. Similar to the Georgia high court, the Colorado Supreme Court in *Lujan v. Colorado State Board of Education* held that the constitutional mandate requiring the state to establish "a thorough and uniform system of free public schools" does not elevate education to a fundamental right that would require absolute equality in educational services and expenditures.[11] Rather it was viewed merely as a mandate for establishing a free education system. No attempt was made to define a minimum level of education in Colorado except

9. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 453 N.Y.S.2 | 643 (N.Y. 1982), *cert. denied*, 103 S. Ct. 775 (1983).
10. McDaniel v. Thomas, 285 S.E.2d at 161.
11. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1983).

to note that no child was being denied an education. The New York high court also found its state in compliance with the constitutional mandate to provide for a system of free public schools. The court reached this decision with little difficulty in view of the evidence that ony two states exceeded New York in expenditures per pupil. The Maryland high court in April 1983 declared that "the State's school finance system is not depriving, interfering with, or impinging upon, much less absolutely eliminating any child's right to an adequate education."[12] Emphasizing that a minimum education was being provided the court stated: "Simply to show that educational resources available in the poorer districts are inferior to those in the rich districts does not mean that there is insufficient funding provided by the State's financing system for all students to obtain an adequate education."[13]

In assessing whether education was a fundamental right, these courts rejected the Supreme Court's test in *Rodriguez* (*i.e.*, whether education is explicitly or implicitly guaranteed in the Constitution). The New York court concluded that the state constitutional mandate to provide education does not "automatically entitle it to classification as a 'fundamental constitutional right.' "[14] The court noted that the rights guaranteed in the federal constitution have greater significance because the tenth amendment limits the scope of the Federal Constitution to delegated powers. In contrast, the New York constitution does not contain such a provision, and many areas and subjects appear that clearly would not be classified as a fundamental right. Similarly, the Maryland and Georgia courts found that this was not a meaningful analysis because of the range of rights and interests addressed in their constitutions.[15]

State supreme court activity has been the primary focus of public attention, but litigation continues in lower level state courts. At the trial court level in late 1982, a challenge to the Michigan school finance system was dismissed in *East Jackson Public Schools v. State*.[16] The Michigan system had survived earlier judicial review in 1973 when the state supreme court dismissed a case, saying that review had been "improvidently granted."[17] The new case charged that the system violates the state constitutional guarantees of equal protection and education because available educational opportunities are dependent on the local

12. Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d at 786.
13. *Id.* at 780.
14. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 453 N.Y.S.2d at 650.
15. Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d at 786; McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981).
16. No. 82-27983 (Jackson Cty. Cir. Ct. 1982), *supra* note 5.
17. Milliken v. Green, 212 N.W.2d 711 (Mich. 1973).

property tax base. The case has been appealed to the state supreme court and oral arguments were heard in November, 1983.

Although the United States Supreme Court upheld the Texas school finance program under the federal constitution, a new suit is being prepared to challenge expenditure disparities under the state constitution. Poor school districts are alleging that state aid has not corrected substantive spending differences and that wealth disparities have worsened since *Rodriguez*.

Unconstitutional Systems

Recently only two state supreme courts have declared their school funding programs unconstitutional—West Virginia and Arkansas. The West Virginia decision has been the focus of considerable attention. In 1979 the state high court declared the system unconstitutional under the education "thorough and efficient" clause as well as the equal protection guarantee.[18] According to the court, the constitutional mandate to provide education required schools to satisfy ***high quality*** statewide educational standards, not simply provide a minimum educational program. Equal educational opportunity was couched in terms of substantive programs and results, "no matter what the expenditures may be."[19] "Thorough and efficient" was defined as an "efficient system of schools that develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."[20]

The case was remanded to determine if interdistrict disparities were a result of the state funding scheme. The lower court was instructed to review the state foundation program and assess whether the state legislature was providing a thorough and efficient system of education.

In May, 1982, the trial court judge handed down a 244-page decision that is one of the most specific and detailed decisions to date.[21] The court set up extensive standards of a high quality education addressing curriculum, personnel, facilities, materials, and equipment and found West Virginia schools woefully inadequate. As indicated, most courts have deferred to legislative bodies to give meaning and substantive content to an adequate or basic education. The West Virginia trial court judge, through expert witneses, outlined in precise details these components. For example, some of the requirements included:

18. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).
19. *Id.* at 865, n.7.
20. *Id.* at 877.
21. Pauley v. Bailey, No. 75-1268 (W. Va. Kanawha Cty. Cir. Ct. May 11, 1982).

curriculum supervisors in each subject area; pupil/teacher ratio not to exceed 20:1 in K-2; 25:1 in 3-12; specified number of square feet per pupil in school facilities; essentials in educational offerings: 100 minutes per week in art (elementary), art 3 periods per week (middle/-junior); foreign language three times a week beginning in the third grade; math 55 minutes daily (elementary 1-4), 275 minutes per week (grades 5-8), 225 minutes per week (grades 9-12).

Similar detail continues for all curriculum areas. Applying these standards, the court found the evidence indicated clearly that property poor districts were unable to offer high quality educational programs. To correct education deficiencies, the judge opted to appoint a special commissioner to work with the legislative and executive branches to develop a master plan pursuant to the court's standards. In addition to striking down the school finance system, the judge also declared the state tax system unconstitutional for allowing substantial variations in property valuations among the counties. Full value assessments were ordered. (Statewide assessments on the average were as much as twenty-eight percent of full market value; some county assessments were as much as twenty-five years out of date). The state tax commissioner was ordered to develop a plan to correct the assessment deficiencies.

Predictably, this decision created considerable backlash. Within a month of the original decision, the trial court judge issued a supplemental order clarifying the ruling.[22] The judge stated that he wanted to make it crystal clear that the master plan was a *proposal*, a *suggestion*, that would conform to the guidelines established at the request of the supreme court. Furthermore, he pointed out that the court cannot and does not have the power—or the jurisdiction—to demand that the legislature adopt a particular plan. He did note, however, that it was a judicial function to determine if the enacted legislation meets the constitutional mandate.

The West Virginia State Board of Education decided not to appeal the case. At the request of education officials, the judge appointed a 99-member commission rather than a special master. A comprehensive education plan recommending extensive school finance reforms costing $1 billion was completed by this group in December, 1982 and ratified by the state judge in March, 1983.[23]

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22. *Id.*, Supplemental Opinion (May 21, 1982).

23. The ability of state and local officials to raise additional revenue for education was enhanced by the passage of two tax-related educational amendments in November, 1982. One provides that local voters will be able to pass "excess levies" and bond issues by a simple majority rather than a three-fifths majority, and the second amendment allows the state legislature to pass a statewide property tax levy for school funding.

In Dupree v. Alma School District No. 30, the Supreme Court of Arkansas held that the state public school financing system violated equal protection guarantees and the requirement that the state provide a suitable and efficient system of schools.[24] The court did not determine whether education is a fundamental right, but instead concluded that there was no legitimate state purpose to support the system. The court noted that it "bears no rational relationship to the educational needs of the individual districts, rather it is determined primarily by the tax base of each district."[25] In the court's view, the principle of local control was inadequate to justify the existing inequities because equalization could be improved without diminishing local control. Furthermore, quoting *Serrano*, the court found the concept of local control to be a "cruel illusion" for poor districts. (Interestingly, this case was reviewed by the supreme court only because three wealthy school districts intervened to fight for the present system. The original state defendants agreed with the trial court's ruling that the system was inequitable and chose not to appeal.)

Enforcement of Court Decisions

Plaintiffs in four states have returned to the judiciary to enforce the implementation of earlier supreme court rulings. In California and Connecticut, the original decisions were reopened. Plaintiffs in California argued that expenditure disparities have increased since the court's earlier order to reduce spending disparities now are not wealth-related but caused by variations in operating costs and local priorities. A superior court judge agreed with the state in May, 1983, finding the state in compliance with the 1974 order.[26] When adjusted for inflation the $100 difference is now $191, and 93 percent of the children are enrolled in school systems within the "band." The judge concluded that the state no longer has a wealth-related system within the meaning of the original property taxes to state taxes. Last year the state paid 80 percent of the cost of education.

New suits have been filed in Washington and New Jersey. In *Seattle School District No. 1 of King County v. Washington*,[27] plaintiffs alleged that the legislature failed to meet the mandate of the 1978 supreme court decision to define and fund a basic education program. Judge Doran, who originally declared the system unconstitutional,[28] agreed

24. 651 S.W.2d 90 (Ark. 1983).
25. *Id.* at 93.
26. Memorandum of Decision, No. 1554 (Los Angeles Super. Ct. 1983).
27. No. 81-2-1713-1 (Thurston Cty. Super. Ct. 1981). *See* Seattle School Dist. No. 1 v. Washington, 585 P.2d 71 (Wash. 1978).
28. Judge Doran held that the state had a paramount duty to make ample provision for educating children of the state.

in May, 1983, finding that the state constitution prohibits underfunding of basic education.[29] Through low appropriations and budget cuts the state had not met its obligations. Under the new ruling, the state must fully fund all programs in basic education. New Jersey plaintiffs are awaiting a decision in *Abbott v. Burke*.[30] The new complaint alleges that the state continues to deprive children in poor urban school districts a thorough and efficient education. Disparities between low and high expenditure districts are even greater than they were prior to the original *Robinson v. Cahill*[31] decision.

Overall, the pace of school finance litigation has not changed radically in the 1980s. As in the 1970s, the majority of state supreme courts rendering decisions have upheld state finance programs and a backlog of unresolved cases remain. Other factors related to school finance challenges, however, have changed. Unlike earlier years, the economic conditions of states is not as supportive of massive reform efforts. Budget surpluses do not exist to fund school finance reforms developed under court mandates, and tax increases do not appear viable. Furthermore, with public attention focused on educational excellence, it will be difficult to address equity concerns. Indeed, state programs developed to meet the demands for excellence may exacerbate existing inequities.

The nature of school finance decisions also may change in the 1980s as exemplified by the West Virginia and Arkansas decisions. As indicated, the West Virginia decision is a significant departure from earlier court orders in terms of its specificity. In the future, courts may follow this lead and take a more active role in structuring the educational program. As the Arkansas Supreme Court, other state courts also may find it is not necessary to declare education a fundamental interest under the state constitution, holding instead that the program cannot meet even the lenient rational basis test.

LOCAL FISCAL ISSUES

School boards facing budget constraints at the local level have found many of their efforts to reduce expenditures or increase revenue challenged under state and federal laws. Some of the actions resulting in litigation have been prompted by decisions affecting areas such as transportation, length of school week, summer school, and tuition charges.

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29. *See, supra* note 27, No. 81-2-1713-1 (Thurston Cty. Super. Ct., April 29, 1983).
30. No. C-1893-80 (Super. Ct. of N.J., Chancery Div., Mercer Cty.). Note: Case was dismissed by trial judge on November 15, 1983, and plaintiffs have appealed directly to the state supreme court.
31. 303 A.2d 273 (N.J. 1973).

A Pennsylvania school district offering half-day kindergarten sessions reduced its budget by eliminating round-trip kindergarten transportation. Instead of employing special buses and drivers for the midday bus routes, the board limited services to transportation only one way on the regular elementary buses. This decision required parents to provide transportation either to or from school depending on which session their children attended. A class action complaint alleging violation of the fourteenth amendment was brought by parents who could not afford to transport their children. The Third Circuit Court of Appeals held that neither the due process clause or equal protection clause was violated.[32] Since education is not a fundamental interest under the federal constitution, the local district's decision was supported by a rational basis—a considerable cost savings to the district. The United States Supreme Court refused to issue a stay in December, 1982 and denied appeal in February, 1983.[33]

A four-day school week may be an effective means of lowering school costs. Districts incurring significant transportation expenditures especially may find this an attractive alternative. A decision from the Supreme Court of Wyoming this year, however, indicates that state laws may pose significant barriers to such local initiatives.[34] The high court interpreted the plain meaning of the Wyoming statutory requirement of 175 school days to mean 175 ***separate school days***. Prior to implementation of the plan the local board had sought and received approval for a pilot project from the state board of education and the attorney general. Parents, however, contested the action because they felt further study was needed before implementation. As in Wyoming statutory language may need to be modified in many states to allow flexibility in scheduling the school week.

While the Wyoming high court ruled that school districts must meet at least the state mandated minimum of 175 days, the South Carolina Supreme Court also found districts were not obligated to provide free schooling *beyond* the regular established school term.[35] The issue before the South Carolina court this year was whether a school district's imposition of fees for summer school violated the state constitutional obligation to deliver a system of free public schools. A unanimous state supreme court held that summer school charges did not violate federal or state laws. The lack of other sources of funds as

32. Shaffer v. Board of School Directors of the Albert Gallatin Area School Dist., 687 F.2d 718 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1209 (1983). It should be noted that Pennsylvania law does not require local school districts to establish a kindergarten program.
33. *Id.*
34. Johnston v. Board of Trustees, 661 P.2d 1045 (Wyo. 1983).
35. Washington v. Salisbury, 306 S.E.2d 600 (S.C. 1983).

well as the absence of a state requirement for summer school led the court to conclude that this was the only way the district could provide a summer program. As in many stages, the majority of school districts in South Carolina offer summer programs on a fee basis.

Although states and local districts may not be required to provide tuition free summer schooling for regular students, courts are interpreting federal laws as requiring extended summer programs for certain handicapped students. The Fifth Circuit Court of Appeals in 1983 held that Mississippi's policy of refusing even to consider schooling beyond the 180-day school year violates the Education for All Handicapped Children Act.[36] Relying on the United States Supreme Court's decision in *Board of Education v. Rowley*,[37] the appellate court ruled that consideration must be given to the individual child's needs. Limiting the educational program to nine months would be inconsistent with determining the unique needs of an individual handicapped child. The Eleventh Circuit Court of Appeals agreed with this interpretation in a Georgia case, concluding that the law requires the state to consider individual needs for continuous education.[38] These cases are consistent with the judicial trend to strike down local and state restrictions on length of the school year for handicapped pupils.[39]

Generally, local school systems charge nonresident students tuition fees. Under state laws, the school districts establish fees for students residing outside the district or residing in the district with someone other than a legal guardian. The Supreme Court last term reviewed such a Texas residency requirement in *Martinez v. Bynum*.[40] The Texas statute allows local school boards to deny tuition free schooling to a minor who lives apart from a parent or legal guardian for the primary purpose of attending the public schools in a particular district. In *Martinez*, Roberto Morales, a United States citizen by birth, left Mexico to live in McAllen, Texas, with his sister for the purpose of attending school. Since he was not living with a parent or legal guardian, the McAllen school district charged Roberto tuition. His sister challenged the policy as a violation of the fourteenth amendment. This case followed in the wake of *Plyler v. Doe* in which the Supreme Court invalidated another aspect of the same Texas statute (exclusion of undocumented alien children from the public schools).[41] In the *Plyler* case,

36. Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).
37. Board of Educ. v. Rowley, 102 S. Ct. 3034 (1982).
38. Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983).
39. *See* Battle v. Pennsylvania, 629 F.2d 629 (3d Cir. 1980), *cert. denied*, 425 U.S. 968 (1980); Yaris v. Special School Dist. of St. Louis Cty., 558 F. Supp. 545 (E.D. Mo. 1983); Phipps v. New Hampshire Cty. Bd. of Educ., 551 F. Supp. 732 (E.D.N.C. 1982).
40. 103 S. Ct. 1838 (1983).
41. 102 S. Ct. 2382 (1982).

the Court, however, did recognize the legitimacy of a residency requirement for all children, including illegal alien children, stating that "a requirement of *de facto* residency, uniformly applied, would not violate any principle of equal protection."[42] The Court in *Martinez* concluded that a bona fide residence requirement "furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents" and that quality local public schools are maintained.[43] The Texas statutory residency test was found to be more lenient than most traditional residency standards (to live in the district with the intent to remain indefinitely) in that it would be met as long as the child was residing in the district for *any purpose* other than school attendance.

School districts in several states have attempted to use state residency requirements to charge military families tuition since the federal government has reduced impact area aid. North Carolina law allows local school systems to charge tuition for children of families legally residing and paying taxes in another state and for children of military families if impact aid does not cover one-half of their educational costs. In May, 1983, a federal district court judge ruled that this law and board policy made pursuant to it intentionally discriminates against the federal government and is prohibited by the supremacy clause of the United States Constitution.[44] The defendant school board in this case had lost over 75 percent of its federal impact aid in the previous two years.

Last year the New Jersey Supreme Court also ordered a local school district to admit military dependent children tuition free. The New Jersey school district faced a 50 percent reduction in impact aid and claimed that military families should be charged fees since they are not legally residents of the state and have no intent to stay. The judiciary ordered admission without addressing the cost and funding issues.

The impact aid controversy has a different twist in Michigan. The United States Department of Education allows states with substantially equalizing funding formulas to count impact aid as part of a district's required local effort for state aid purposes. As a result, a district receiving impact aid appears wealthier and receives less state funding. Two Michigan districts filed suit last year against the state and federal governments to recover lost aid.[46] The case was dismissed, but the school systems have appealed.

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42. Martinez, 103 S. Ct. at 1842 (*quoting* Plyler).
43. *Id.*
44. United States of America v. Onslow Cty. Bd. of Educ., No. 82-97-Civ-4 (E.D.N.C. May 16, 1983).
45. *In re* Pemberton School Dist., No Docket Number (N.C. Sept. 7, 1982).
46. Gwinn Area Schools v. State, No. 82-6125-CZ (Delta Cty. Cir. Ct. 1983).

Although this is not an exhaustive review of local school finance litigation, it does provide a cross section of fiscal issues. Such issues will continue to arise as districts attempt to initiate budget reduction measures and identify additional sources of revenue. In these instances, state laws will be paramount in construing local authority and responsibility. As evident from the cited cases, modifications may be needed in some state laws to expand fiscal management options. While all aspects of the school program are being scrutinized for potential reductions, services for special populations such as the handicapped may not only be exempt from cuts but actually require expansion.

FEDERAL AID ISSUES

Recent attention has been focused on two controversial issues at the federal level. First, the authority of the federal government to recover misspent Title I funds has been unclear and was addressed by the Supreme Court in 1983. A second issue creating substantial furor through the fall of 1983 was an order by a federal district court judge freezing department of education funds. This action resulted from the federal government's failure to fulfill its agreement to provide financial assistant for Chicago's desegregation plan. Also, a third area generating litigation in state and federal courts involves federal aid under the Payments in Lieu of Taxes Act.

Title I Recovery Authority

Last term the Supreme Court upheld the department of education's authority to collect misspent Title I funds from states.[47] The Education Amendments of 1978 gave the secretary of education recovery authority but federal appellate courts disagreed on whether funds misspent by states prior to 1978 must be repaid.[48] In *Bell v. New Jersey and Pennsylvania*, the states argued that the 1978 repayment collection power was prospective only. They maintained that prior to 1978 the secretary had two alternatives for noncompliance: funds could be withheld until compliance or applications could be denied if programs were not in compliance. In this case, the Court did not address whether the 1978 amendment was retroactive but rather concluded that the intent of earlier laws was that states should return misspent funds. Legislative history, the plain language of the Act, and congressional debate on the 1978 amendment were found clearly to support a right of recovery.

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47. Bell v. New Jersey and Pennsylvania, 103 S. Ct. 2187 (1983).
48. Pennsylvania v. Secretary of Educ., 662 F.2d 208 (3d Cir. 1981); West Virginia v. Secretary of Educ., 667 F.2d 417 (4th Cir. 1981).

The Court was not receptive to New Jersey's proposal of a "setoff" (that is, the secretary would reduce future grants, and the state would operate fewer Title I programs). "It is hardly likely," the Court stated, "that Congress intended disadvantaged children to suffer twice: once when the state misspent the funds and once when the state cancels an otherwise eligible program because of the secretary's refusal to fund it."[49]

The issue for New Jersey and Pennsylvania as well as approximately seventeen other states owing a total of $64 million is not settled. Still pending before federal circuit courts is the question of whether the funds were actually misused by the states. In September, 1983, the Sixth Circuit Court of Appeals ruled in favor of the State of Kentucky.[50] The department of education audit finding against Kentucky of $338,000 for supplanting state and local financial aid was overturned by the appellate court. The cited violation involved Kentucky's practice of allowing districts to provide self-contained classes for Title I students if they continued to spend the same amount of state and local funds as they would have without the classes. The department of education maintained that although district and school level effort was not reduced the Title I money did not benefit the disadvantaged students. The court, in ruling that Kentucky tried to meet the supplement rather than supplant rule, concluded that the regulations were not sufficiently clear.

Department of Education Funding Freeze

On September 24, 1980, the United States and the Chicago Board of Education signed a consent decree in which the Chicago Board agreed to develop a comprehensive desegregation plan and the federal government agreed to make every good faith effort to find and provide financial funds for implementation. A federal district court judge concluded in June, 1983 that the federal government had breached the decree and froze $47.5 million in fiscal 1983 funds of the department of education and ordered the department to identify funds that could be made available for the Chicago plan, including funds that could be reprogrammed as well as funds from other federal agencies.[51] The programs included in the fund freeze were Title IV desegregation aid, women's education equity, Follow Through, general assistance for the Virgin Islands, and Bell's discretionary fund. The freeze substantially disrupted these federal programs and drew nationwide protests from all sectors.

49. Bell v. New Jersey & Pennsylvania, 103 S. Ct. at 2193.
50. Kentucky v. Secretary of Educ., 717 F.2d 943 (6th Cir. 1983).
51. United States v. Board of Educ. of Chicago, 567 F. Supp. 272 (N.D. Ill. 1983).

In September, 1983, the Seventh Circuit Court of Appeals upheld the freeze agreeing that the federal government had violated the agreement.[52] Under the district court's order, the federal government's obligation is to: (1) "provide" any presently available funds; (2) "find" every available form of funds, by identifying excess or otherwise available appropriations for other purposes and (a) notifying Congress of the intent to reprogram such funds when they are in the same budget account, or (b) seeking congressional reappropriations of such funds from other budget accounts; (3) "find" funds by not failing to seek appropriations that could be used for desegregation assistance to Board, and by not attempting to rescind all such appropriations.[53]

The department of education has gained control of a portion of the fiscal 1983 budget. Congress appropriated $20 million in a temporary spending bill in September and the district court judge released $20 million. The disposition of the remaining $27.5 million will be determined after a trial to determine the extent of the federal government's financial duty to aid Chicago desegregation.

In Lieu of Taxes Aid

In 1976 Congress passed Title 31 U.S.C. § 1601, the Payments in Lieu of Taxes Act. Under this act, county governments receive payments in lieu of taxes for federally owned land. Interior regulations promulgated under the act exclude school districts from receiving direct payments. Two recent cases addressed whether states can compel counties to distribute funds to schools and whether interior regulations impermissibly deny school districts these funds.

A South Dakota law provides that "the county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed." Lawrence County refused to distribute these funds, and three school systems in the county that would have received 60 percent of the act's funds brought suit. The Supreme Court of South Dakota examined the plain language of the federal act which specifies that funds "may be used by such unit for any governmental purpose," and found the support of school districts to be a governmental purpose within the meaning of the law.[54] According to the court, if Congress had intended to exclude schools it could have included that prohibition in the law. The court concluded that state determination of distribution did not violate the Supremacy Clause

52. United States v. Board of Educ. of Chicago, 717 F.2d 378 (7th Cir. 1983).
53. Board of Educ. of Chicago, 567 F. Supp. at 283.
54. Lead-Deadwood Dist. v. Lawrence Cty., 334 N.W.2d 24 (S.D. 1983), *petition for cert. filed*, 52 U.S.L.W. 3123 (U.S. Aug. 23, 1983).

since the action did not interfere with accomplishment of the federal law. The money was being distributed to the county (the unit of local government) and was being expended for a governmental purpose.

School districts in Arkansas brought suit challenging the Secretary of Interior's definitions under the federal act that precluded school district's from receiving direct payments in lieu of taxes. The act specifies that payments will be made to each unit of local government in which entitlement lands are located and further defines a unit of local government as "a county, parish, township, municipality, . . . or *other unit of general government* as determined by the Secretary" in accordance with standards established by the Bureau of Census [emphasis added].[55] Under the secretary's definition, other units of general government "excludes single purpose or special purpose units of local government such as school districts or water districts."[56] Since Congress did not specifically include school districts, an Arkansas federal district court held that the Secretary of Interior's actions were not unlawful or beyond his authority.[57] The federal court did note that evidence indicated Congress's intent that school districts should benefit from the funds but left equitable disbursement to the counties.

PUBLIC AID TO NONPUBLIC SCHOOLS

Public financial support to nonpublic schools (specifically parochial schools) continues to generate litigation as well as political debate. States have attempted to evade first amendment establishment clause limitations through a wide range of financial aid programs. These measures have included support such as textbooks, transportation, remedial instruction, testing, instructional materials, maintendance of facilities, and tax credits.

Probably the most controversial of the public aid strategies was reviewed by the Supreme Court in 1983. In a 5-4 decision the Court upheld a Minnesota tuition tax deduction law.[58] This decision has far-reaching fiscal implications for public education. Additionally, recent state and federal cases continued to scrutinize the operation of long standing aid programs such as transportation and textbooks.

Tuition Tax Deductions

In 1973 the Supreme Court struck down a New York income tax credit statute designed to provide relief for parents paying nonpublic

55. 31 U.S.C. § 1606(c).
56. 43 C.F.R. § 1881.0-5(b)(2).
57. Altus-Denning School Dist. v. Franklin Cty., 568 F. Supp. 95 (W.D. Ark. 1983).
58. Mueller v. Allen, 103 S. Ct. 3062 (1983).

school tuition.[59] The Court applied the traditional tripartite test used to assess establishment clause claims and found that the statute advanced religion by financially rewarding parents for sending their children to parochial schools. Following this decision, other courts found similar constitutional violations when reviewing tax credit and tax deduction plans.

In June, 1983, a divided Supreme Court upheld a Minnesota tax deduction law, finding it "vitally different" from the New York statute.[60] First, the Court noted it was only one deduction among many in the tax law and that judicial deference must be given to legislative judgment regarding equalization of tax burdens. In the Court's view, however, the most important distinction was that the deduction was available for educational expenses incurred by all parents. The fact that a broad spectrum of parents benefited persuaded the majority to conclude that the law evidenced a secular purpose and did not have the primary effect of advancing religion.

From current political debates, it is clear that the Supreme Court's decision has provided the impetus for other states and the federal government to pursue the enactment of similar measures. Although the *Mueller* decision has provided encouragement for the Reagan Administration in its efforts to enact tuition tax credits at the federal level, it would appear that the present proposal directed solely at nonpublic school children would not differ significantly from the earlier New York plan which the Court distinguished from the Minnesota program. In assessing the Minnesota deduction, the court stated; "Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools."[61] Significant costs of including public school parents may deter modification of the federal proposal.

Transportation Aid

In 1947, the Supreme Court in *Everson v. Board of Education* established that public aid to transport nonpublic students does not violate the first amendment. Many related questions, however, were not answered by this decision and cases continue to arise. Two recent cases illustrate some of the continuing controversies.

The First Circuit Court of Appeals in 1983 upheld a Rhode Island statute providing bus transportation to nonpublic school children

59. Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
60. Mueller v. Allen, 103 S. Ct. 3062 (1983).
61. *Id.* at 3068.

beyond school district limits.[62] The law divides the state into five regions and requires each local school district to provide a resident student, whether attending a public or private school, with bus transportation to the school or facility which the pupil attends as long as the school is within the region in which the pupil resides. While this appears neutral, in fact, public school pupils are required to attend school within their district of residence unless there is an approved exception because of a special program or curriculum. Although the Rhode Island law had a lengthy and intricate history of legislative efforts to provide transportation to sectarian students, the appellate court found that the law had a secular purpose, did not advance religion, or involve excessive governmental entanglement. The court did not find it significant that public school children were ineligible for busing beyond their school district lines, or that sectarian students were bused over special routes. The court did say the relative costs per student should remain "roughly proportional." Because of inadequate cost data, the court could not determine if the difference was excessive in this case. In an appeal to the Supreme Court in August, the district maintained that the cost is excessive. The Jamestown district purports to spend $180 on public school students and $847 on nonpublic students. The Supreme Court declined to review the case in October, 1983.

In West Virginia, Catholic parents brought an action to require the local school board to provide transportation to and from nonpublic schools for students. The board was providing monetary stipends and permitting students to ride buses on established routes. The West Virginia Supreme Court held that public and parochial students could be treated differently under a state law requiring transportation of all students. The local board had met its duty.[63]

Textbooks

Another form of public financial support that continues to be challenged is aid for textbooks. The Eighth Circuit Court of appeals reviewed a South Dakota law requiring local school districts to loan textbooks and related workbooks to students in nonpublic schools and found the law facially neutral.[64] The Court, however, remanded the case because evidence was not sufficient to determine if district application involved the loan of materials proscribed by the Constitution.

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62. Members of Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1st Cir. 1983), *cert. denied*, 52 U.S.L.W. 3285 (Oct. 4, 1983).
63. Janasiewicz v. Board of Educ. of Cty. of Kanawha, 299 S.E.2d 34 (W. Va. 1982).
64. Elbe v. Yankton Indep. School Dist., 714 F.2d 848 (8th Cir. 1983).

Although loan of textbooks does not violate the federal constitution, some states continue to find that it violates their state constitutions. In July the Kentucky Supreme Court ruled that the state constitution has "much more detailed and explicit proscription" than the first amendment.[65] Kentucky's constitutional provision for education specifies that "no portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian, or denominational school."[66] Additionally, the law specifies that "taxes shall be levied and collected for public purposes only."[67] The court found that "A fair reading of these several sections of the constitution compels the conclusion that money spent on education is to be spent exclusively in the public school system."[68]

CONCLUSION

A common issue underlying school finance litigation at all levels of government is sufficiency or adequacy of revenue. Most often this debate focuses on the state's responsibility to provide for a free system of public schools. Other issues, however, also surface: local budget autonomy, state and federal program mandates, public aid to nonpublic schools, individual federal rights, and the federal government's responsibility. The resolution of these issues has significant implications for ensuring the funding of quality public education programs.

65. Fannin v. Williams, 655 S.W.2d 480, 483 (Ky. 1983).
66. *Id.* at 482.
67. *Id.*
68. *Id.*